

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

TRAYLOR BROS., INC., et al.,	)	Civil No. 08-1019-L(WVG)
	)	
Plaintiffs,	)	ORDER REGARDING
	)	PROTECTIVE ORDER
v.	)	
	)	
SAN DIEGO UNIFIED PORT	)	
DISTRICT,	)	
	)	
Defendant.	)	
_____	)	

1. Introduction

On January 13, 2011, the Court held a Case Management Conference (hereafter "CMC") in this action. Prior to the CMC, counsel submitted to the Court a Joint Discovery Plan. At the CMC, the Court discussed with counsel, *inter alia*, the need for a protective order, as noted in the Joint Discovery Plan at section II.G. After the Court discussed with counsel the issues related to the protective order, it ordered counsel to file supplemental briefs

1 regarding the propriety of the protective order. On January 20,  
2 2011, counsel filed the requested supplemental briefs.<sup>1/</sup>

### 3 2. Parties' Arguments

4 Plaintiff Traylor Bros, Inc. (hereafter "Traylor"), argues  
5 that a protective order, as suggested in the Joint Discovery Plan at  
6 section II.G., is appropriate in this case for the following  
7 reasons: It intends to make available to all parties in this case  
8 (1) confidential, proprietary information and trade secrets with  
9 respect to the means and methods by which it bids and performs  
10 projects; (2) proprietary computer software; (3) financial informa-  
11 tion relating to revenues, margins, profits, costs of labor and  
12 equipment; and (4) staffing, scheduling, subcontracting and  
13 equipping particular projects. Therefore, if a protective order is  
14 not in place in this litigation, Traylor's competitors could seek  
15 its confidential and proprietary information through a California  
16 Public Records Act<sup>2/</sup> (hereafter "CPRA") request to the San Diego  
17 Unified Port District (hereafter, "the Port").

18 Further, Traylor argues that by suing the Port, it did not  
19 waive its rights to privacy, a protective order insulates the Port  
20 from CPRA exposure, and that it is inappropriate to have it  
21 indemnify the Port by requiring it to hold the Port harmless and  
22 defend and indemnify the Port for costs and fees associated with  
23 responding to a CPRA request for its confidential information.

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26 <sup>1/</sup> Third Party Defendant Anchor Environmental joined Traylor Bros.,  
27 Inc. in its position regarding the San Diego Unified Port District's  
28 request for an indemnity provision in the Joint Discovery Plan. See  
the discussion regarding the San Diego Port District's request for  
an indemnity provision below.

<sup>2/</sup> California Government Code §§ 6250-6264.

1           The Port argues that Traylor has failed to show good cause  
2 for the protective order, Traylor has waived its privacy rights, and  
3 that imposition of a protective order will subject the Port to costs  
4 and fees associated with responding to state and federal law record  
5 requests that seek Traylor's confidential information. Therefore,  
6 Traylor should defend and indemnify the Port for any costs and fees  
7 associated with the Port's responses to requests for Traylor's  
8 confidential information.

9           3. Discussion

10           a. Protective Order Under the Federal Rules of Civil  
11           Procedure

12           Pursuant to Federal Rule of Civil Procedure 26(c)(1)(G), a  
13 protective order is appropriate if the party seeking the protective  
14 order shows good cause and the information sought to be protected is  
15 a trade secret, confidential research, development or commercial  
16 information. "A party asserting good cause (for a protective order)  
17 bears the burden, for each particular document it seeks to protect,  
18 of showing that specific prejudice or harm will result if no  
19 protective order is granted." Foltz v. State Farm, 331 F.3d 1122,  
1130 (9<sup>th</sup> Cir. 2003).

20           Here, Traylor has sufficiently met its burden by explaining  
21 the nature of the documents that require protection and the  
22 rationale underlying its request for a protective order for those  
23 documents. In addition, the Court relies on its own experience to  
24 conclude that the nature of the documents identified by Traylor  
25 require protection from disclosure to persons or entities that are  
26 not parties to this litigation.

1                   b. CPRA California Government Code §6254(b)

2                   The CPRA, at California Government Code §6254, lists several  
3 areas where disclosure of documents, subject to a CPRA request, are  
4 exempt from disclosure. California Government Code § 6254 states in  
5 pertinent part:

6                   ...(N)othing in this chapter shall be construed to  
7 require disclosure of records that are any of the  
8 following...

9                   (b) Records pertaining to pending litigation to which  
10 the public agency is a party,... until pending litigation or claim has been finally adjudicated or otherwise settled.

11                   ...  
12 (k) Records, the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege.

13                   "Since disclosure (under the CPRA) is favored, all exemptions  
14 are narrowly construed. The agency opposing disclosure bears the  
15 burden of proving that an exemption applies." County of Santa Clara  
16 v. Superior Court, 170 Cal. App. 4<sup>th</sup> 1301, 1321 (2009)(citations  
17 omitted).

18                   Section 6254(b) does not apply in this case because "(a)  
19 document is protected from disclosure under the pending litigation  
20 exemption only if the document was *specifically prepared for use in*  
21 *litigation*." Board of Trustees v. Superior Court, 132 Cal. App. 4<sup>th</sup>  
22 889, 897 (2005), citing County of Los Angeles v. Superior Court  
23 (Axelrad), 82 Cal. App. 4<sup>th</sup> 819, 825 (2000)(emphasis in original).  
24 Here, the documents Traylor seeks to protect were not prepared for  
25 use in litigation. In fact, it appears that at the time the  
26 documents Traylor seeks to protect were created, litigation was not  
27 even contemplated, much less specifically prepared for use in  
28 litigation.

1 Even if § 6254(b) applied, the confidential nature of the  
2 documents Traylor seeks to protect would expire upon completion of  
3 the litigation. Therefore, the documents would become disclosable by  
4 the Port upon an appropriate request. "Section 6254(b) only applies  
5 to litigation-related documents while litigation is pending.  
6 Documents exempt from disclosure while litigation is pending are  
7 subject to disclosure under the (C)PRA once the litigation has  
8 ended." Board of Trustees, 132 Cal. App. 4<sup>th</sup> at 899. Accordingly, §  
9 6254(b) does not provide the type of protection that Traylor seeks  
10 because the Port could disclose the documents for which Traylor  
11 seeks protection after the litigation has ended. As a practical  
12 matter, documents disclosed under a protective order are often  
13 returned to the disclosing party, or destroyed, when the litigation  
14 has concluded. Consequently, even under § 6254(b), Traylor's trade  
15 secrets and confidential information may not be in the Port's  
16 possession after the litigation is concluded and thus not subject to  
17 disclosure under the CPRA.

18 c. CPRA California Government Code § 6254(k)

19 While California Government Code § 6254(b) does not apply in  
20 the situation presented to the Court, § 6254(k) does apply. The  
21 documents protected from disclosure pursuant to this section are  
22 documents that were not prepared for use in litigation, (e.g. trade  
23 secrets) and also applies after the litigation has concluded. Trade  
24 secrets are generally protected from disclosure but not when "the  
25 owner divulges them or when they are discovered through proper  
26 means." Chicago Lock Co. v. Fanberg, 676 F.2d 400, 404 (9<sup>th</sup> Cir.  
27 1982).

1 Here, the Port provided the Court a list of disclosures made  
2 by Traylor in the bidding process, during the performance of the  
3 project, and in the claims process. The Port contends that these  
4 disclosures were not made pursuant to a protective order nor  
5 pursuant to a confidentiality agreement. The Port further claims  
6 that Traylor's disclosures in these regards are the very same trade  
7 secrets and proprietary and confidential information, which Traylor  
8 now wants to protect from disclosure. If the Port is correct and  
9 Traylor made certain disclosures during the bidding process,  
10 performance of the project, and in the claims process, then as to  
11 those documents, such protection was waived pursuant to Chicago  
12 Lock. Therefore, the Court agrees that the Port's position in this  
13 regard has merit.

14 However, the Port's request that Traylor agree to defend and  
15 indemnify it for costs and expenses of responding to a CPRA request  
16 does not have merit. The Port has not presented to the Court any  
17 authority that would support such a request.

18 As a result of the foregoing, counsel shall modify the  
19 protective order to include the following language:

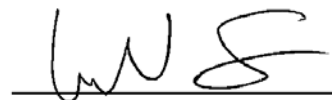
20 With respect to documents submitted by Traylor during  
21 the bidding process, performance of the project, and  
22 in the claims process, and which are now considered  
23 public documents subject to disclosure under the CPRA,  
24 confidentiality is waived. These documents are specif-  
25 ically excluded from protection under this Protective  
Order. Any other documents identified by Traylor that  
fall within the categories of trade secrets, propri-  
etary and/or confidential information are properly  
subject to confidentiality under the Protective Order.

26 On or before February 23, 2011, counsel shall provide to the  
27 Court clarification regarding what is meant by "within a reasonable  
28

1 time," as used in the Joint Discovery Plan at page 14, paragraph  
2 G.1.(c).

3 On or before March 2, 2011, counsel shall file with the Court  
4 the Joint Discovery Plan. The Joint Discovery Plan shall include all  
5 of the changes noted in this Order, as well as the changes noted by  
6 the Court in its January 13, 2011 discussions with counsel.

7  
8 DATED: February 16, 2011

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11 Hon. William V. Gallo  
12 U.S. Magistrate Judge  
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